

Appl. No. 10/804,381
Atty. Docket No. 7892C
Amdt. dated March 16, 2007
Reply to Office Action of December 20, 2006
Customer No. 27752

REMARKS

Claim Status

Claims 1-9 and 11-19 are pending in the present application. No additional claims fee is believed to be due.

Rejection Under 35 USC §103(a) Over Roe (U.S. 5,643,588) in view of Johansson et al. (US 6,562,802)

Claims 1-20 have been rejected under 35 USC §103(a) as being unpatentable over Roe (U.S. 5,643,588) in view of Johansson et al. (US 6,562,802).

Applicants had previously cancelled Claims 10 and 20. Therefore, Applicants submit that the rejection of Claims 10 and 20 is moot.

Issue on Appeal

The issue on appeal will be whether or not there is any suggestion or motivation to combine Roe and Johansson to use the chitosan disclosed by Johansson in the lotion disclosed by Roe, thereby achieving the claimed invention.

Applicants say no. The Examiner says yes.

Applicants agree that Roe teaches a lotion including a paraffin wax (used as an immobilizing agent).

Applicants agree Roe fails to teach the claimed chitosan.

Applicants agree that Johansson teaches chitosan.

Applicants disagree that Johansson teaches chitosan for the purposes disclosed and claimed in the instant application.

Applicants disagree that there is any motivation to modify or combine the references to achieve the claimed invention.

The reasons are as follows:

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1. **There is no suggestion or motivation to combine the cited references to achieve the lotion of Roe having chitosan as a skin care active.**

In the Final Office Action the Examiner stated on page 6, "In contrast to applicants' argument that chitosan is not recognized for its skin care activity, Johansson teaches chitosan polymer as a skin protector (col. 8, line 51 – col. 10, line 25)."

The Examiner's point is exactly right, and this is why the claimed combination is not suggested.

The claimed invention has nothing to do with chitosan being used as a skin protector.

The claimed invention recites and relies on a paraffin wax as a skin protector, i.e., as a barrier protectant.

The claimed invention recites a barrier protectant in the form of paraffin wax, and a skin car active in the form of chitosan.

Therefore, even assuming that Roe discloses paraffin wax as a barrier protectant (it does not), there must be some motivation in the cited references to combine the chitosan of Johansson with the barrier protectant of Roe.

But according to the Final Office Action, "Johansson teaches chitosan polymer as a skin protector".

What possible motivation can there be, therefore, to combine a skin protector with a lotion that already has a skin protector?

Applicants maintain that there is none.

2. **Johansson does not disclose chitosan as a skin care active.**

In the Final Office Action the Examiner stated on page 6, "Further, examiner notes that instant claims do not recite any specific skin care activity by chitosan nor does the instant specification provide any definition with respect to the term skin care"

Applicants respectfully disagree.

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First, it is not necessary that the claims recite a specific skin care activity. The argument is misplaced.

Second, the instant specification very definitely does provide a definition with respect to the term "skin care [active]".

At page 7, first paragraph, Applicants list exactly what skin care actives suitable for use in the claimed invention include. Skin care actives are described for many functions.

A skin care active is disclosed optionally as being a "skin protectant" but cannot be such in the claimed invention because there is already a skin protectant claimed. Therefore, in the claimed invention, a skin care active must be something other than a skin protectant.

Therefore, a skin care active of the claimed invention is one of a skin conditioning agent, pH control agent, etc.

Johansson does not disclose chitosan as a skin care active, as disclosed and claimed in the instant application.

Johansson discloses chitosan as "a scavenger of skin irritating agents" in a "topical barrier formulation" (column 7, line 63).

What possible motivation can there be, therefore, to combine the "scavenger of skin irritating agents" of Johansson as a skin care active in the lotion of Roe?

Does Roe ever suggest the benefit of incorporating a scavenger of skin irritating agents?

Applicants say no. Roe already has a topical barrier formulation, and would have absolutely no need to add in another, much less in the form of something as unusual as chitosan.

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3. The Final Office Action fails to provide any teaching or suggestion to modify Roe in view of Johansson the add chitosan as a skin care active.

In the Final Office Action the Examiner stated on page 7, "Thus, the motivation to include chitosan of Johansson in the skin barrier protection composition of Roe comes from the skin barrier protecting effect of chitosan."

Applicants respectfully submit that this does not make sense.

Why would a lotion already having a skin barrier composition need another skin barrier composition?

The Final Office Action states that the "unexpected result is to protect skin from contacting with the bowel waste material."

But Roe already achieves this result.

What motivation could there possibly be to solve a problem already solved?

Applicants maintain there is none.

Moreover, Applicants maintain the arguments of previous responses (incorporated herein by reference), specifically the argument that the MPEP §2143.01 provides: "The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination." (References omitted).

Applicants respectfully submit (and have shown) that there is absolutely no suggestion of the desirability of the combination. The combination is purely the result of picking and choosing among disparate disclosures to find a combination of ingredients based on hindsight.

Applicants believe hindsight reasoning is improper.

Accordingly, Applicants respectfully submit that the Office Action has impermissibly relied upon hindsight to pick and choose ingredients from two disparate and unconnected references, neither of which have a nexus with the other. Such picking and choosing may result in each of the claim limitations being identified, but a prima

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facie case of obviousness requires that there be some motivation to combine references. Applicants respectfully request the withdrawal of the 35 USC §103 rejection of Claim 1 and its dependent claims 2-9 and 11-13.

Claims 14-16:

In addition to the reasons provided above with respect to the claimed release composition, Claim 14 recites an article comprising a dispensing means.

The Office Action fails to indicate why one skilled in the art knowledgeable about the particular dispensing means disclosed in Roe would have any motivation to modify the lotion of Roe based on Johansson which appears to disclose no dispensing means at all.

No response has been made to this argument.

Accordingly, Applicants respectfully submit that the Office Action fails to establish a prima facie case of obviousness in accordance with MPEP 2143 for Claims 14-16, and request the rejection be withdrawn.

Claims 17-19:

In addition to the reasons provided above with respect to the claimed release composition, Claim 17 recites a method comprising “applying” by a dispensing means and “exposing to moisture”.

The Office Action fails to indicate why one skilled in the art knowledgeable about the particular dispensing means disclosed in Roe would have any motivation to modify the lotion of Roe based on Johansson which appears to disclose no dispensing means at all.

Further, the Office Action fails to disclose where in either reference is found the method step of “exposing to moisture” to release one or more skin care active ingredients from a release composition, as claimed in Claim 17.

No response has been made to this argument.

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Accordingly, Applicants respectfully submit that the Office Action fails to establish a prima facie case of obviousness in accordance with MPEP 2143 for Claims 17-19, and request the rejection be withdrawn.

Double Patenting

Applicants submit that they will timely file any necessary terminal disclaimers upon the indication of allowable subject matter.

Conclusion

In light of the above remarks, it is requested that the Examiner reconsider and withdraw the rejections. Early and favorable action in the case is respectfully requested.

This response represents an earnest effort to place the application in proper form and to distinguish the invention as now claimed from the applied references. In view of the foregoing, reconsideration of this application, entry of the amendments presented herein, and allowance of Claims 1-9, and 11-19 is respectfully requested.

Respectfully submitted,

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By


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